

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JENNIFER ROUSE o/b/o M.M.G.,
Plaintiff,

v.

MICHAEL J. ASTRUE, Commissioner
of Social Security

Defendant.

Case No. C11-5717RSL

ORDER REMANDING TO THE
COMMISSIONER FOR FURTHER
PROCEEDINGS

This matter comes before the Court on the Report and Recommendation of the Honorable James P. Donohue (Dkt. # 20). Having reviewed the motion and memoranda de novo and considered the remainder of the record, the Court finds as follows:

(1) As the Court stated in its previous Order (Dkt. # 18), this Court “has jurisdiction to consider Plaintiff’s claim that the Commissioner denied her due process of law by failing to provide her timely notice of its decision.” See Udd v. Massanari, 245 F.3d 1096, 1099 (9th Cir. 2001). To the extent that Judge Donohue’s report can be interpreted to suggest otherwise, the Court declines to adopt it.¹

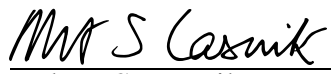
(2) Because this Court has jurisdiction, it REMANDS this matter back to the Commissioner for further proceedings.

¹ As Plaintiff’s correctly states, the Court found that it lacked jurisdiction only over Plaintiff’s claim that “she had good cause for the late filing.” Compare Dkt. # 21, with Order (Dkt. # 18) (citing Matlock v. Sullivan, 908 F.2d 492, 494 (9th Cir. 1990)).

1 On remand, the Commissioner may elect to abandon his previous position. If so,
2 he should vacate the Appeals Council's July 6, 2011 order dismissing Plaintiff's request
3 for review and accept Plaintiff's request as timely filed. On the other hand, if the
4 Commissioner maintains his position regarding Plaintiff's filing, he must hold an
5 evidentiary hearing and make specific findings regarding whether there exists any actual
6 proof that Plaintiff was mailed a copy of the ALJ decision dated March 18, 2010. See
7 Snow v. Astrue, No. 11-1012-JWL, 2011 WL 1642520 (D. Kan. 2011) (noting the need
8 for the Commissioner "to present evidence from an individual with personal knowledge
9 of mailing, or that would permit a reasonable inference" that "the notice had sufficient
10 postage and was deposited in the mail"). If sufficient actual proof is lacking, see id., the
11 Appeals Council's July 6, 2011 order dismissing Plaintiff's request for review must be
12 vacated, and Plaintiff's request must be accepted as timely filed.

13 Notably, if the Commissioner finds that sufficient actual proof of mailing has
14 been presented, he may find that there exists a presumption that notice was received as
15 required by 20 C.F.R. § 416.1468(a). To be clear, though, he may not treat this
16 presumption as absolute. If Plaintiff files affidavits or other evidence supporting her
17 position that notice was never received, cf. Dkt. # 15-1, the Commissioner must consider
18 that evidence and determine whether it rebuts the presumption that arises upon mailing.
19 See Hernandez-Velasquez v. Holder, 611 F.3d 1073, 1077 (9th Cir. 2010). And as the
20 Ninth Circuit has explained, such affidavits are not to be discarded lightly. Id. To the
21 contrary, they "play a crucial role as rebuttal evidence because 'the only evidence
22 regarding mailing petitioners would have is information about their own receipt or
23 nonreceipt of the decision.'" Id. If the Commissioner declines to credit them, he must
24 adequately explain why. Id. (remanding because the agency failed "to provide any
25 explanation" for its disregard of "the affidavits submitted by Singh and his attorney
26 stating that Singh had not received a copy of [the agency's] decision.").

1 DATED this 13th day of July, 2012.

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4 Robert S. Lasnik
5 United States District Judge
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